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Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within their Territories

*Edward T. Hayes**

I. INTRODUCTION AND OVERVIEW

On November 14, 2001 the 142 Members of the World Trade Organization (“WTO”) successfully concluded their 4th Ministerial Conference in Doha, Qatar by agreeing to launch a new round of trade negotiations. The Doha Ministerial Declaration provides a mandate for negotiations on twenty-one subjects, including topics already under negotiation and new disciplines for possible future implementation.¹ The Doha agenda represents an aggressive attempt to conclude negotiations on difficult existing topics, to consider new disciplines and to address “outstanding implementation issues” in an effort to “rebalance the rights and obligations nations assumed as part of the Uruguay Round package.”² Particularly intriguing are efforts to reach a single undertaking on services

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¹ Negotiations on agriculture and services had already begun in 2000. New topics include trade and investment, trade and competition policy, transparency in government procurement and trade facilitation. Trade and the environment is another notable inclusion. See *Ministerial Declaration*, WT/MIN(01)/DEC/1 (Nov. 20, 2001)[hereinafter *Doha Ministerial Declaration*].

² TERENCE P. STEWART, AFTER DOHA, THE CHANGING ATTITUDE & IDEAS OF THE NEW WTO ROUND 1(2002).

by January 1, 2005, and negotiations on the relationship between existing General Agreement on Tariffs and Trade ("GATT")/WTO rules and trade obligations contained in multilateral environmental agreements.³ In addition to the broad topical agenda, the Doha Ministerial concluded the accession of the People's Republic of China to the WTO.⁴

Unfortunately, the promise of Doha remained unfulfilled, after the 5th Ministerial Conference in Cancun, Mexico ended in acrimony, particularly with respect to the agriculture and Singapore issues.⁵ Despite the failure of Cancun, recent events indicate a renewed effort to invigorate the stalled Doha agenda and a willingness to re-engage the multilateral process.⁶ To the extent the Doha agenda is resuscitated, and the WTO attempts to commit more complex and politically sensitive issues to supranational governance, the WTO must address the fundamental issue of how the new trade agenda impacts the oft-debated question of sovereignty. Some of the disciplines currently under debate have the potential to upset the balance struck between Member sovereignty and the supranational authority necessary to regulate the massive undertaking concluded in the Uruguay Round. This balance is particularly at risk due to the possible addition of new disciplines that not only have implications for nation/state sovereignty but also the autonomy of regional and local governments within Members employing federal or federal-like forms of government.⁷

³ *The Doha Declaration Explained*, available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last visited Feb. 11, 2004).

⁴ See *Doha Ministerial Declaration*, *supra* note 1.

⁵ See *Day 5: Conference ends without consensus*, available at http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (Sept. 14, 2003). The Cancun Ministerial was marked by a group of 20 developing countries, the so-called "G-20," demanding greater access and removal of trade barriers and domestic support systems in agriculture.

⁶ See Office of the U.S. Trade Representative, *A Common-Sense Approach to Advance the Doha Development Agenda*, (Jan. 12, 2004) available at http://www.ustr.gov/wto/2004-01-12-doha_advance.pdf.

⁷ For example, completion of a single package on international trade in services raises concerns regarding political autonomy and sovereignty. Services necessarily involve a high degree of regional and local regulation which raises the stakes in the effort to transfer services to the international arena. See Tycho H.E. Stahl, *Liberalizing International Trade in Services: The Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, 410 (1994); Matthew Schaefer, *Note on State Involvement in Trade Negotiations, the Development of Trade Agreement Legislation, and the Administration of Trade Agreements*, in LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 137-139 (John H. Jackson et al. eds., 2002).

Another example is trade and the environment. Many regional and local governments retain the ability to impose environmental regulations which go beyond national requirements. These regulations could have potentially negative implications on various aspects of trade liberalization. See e.g., Terence P. Stewart, *The Uruguay Round Agreements Act: An Overview of Major Issues and Potential Trouble Spots in THE WORLD TRADE*

Sovereignty is a delicate subject traditionally invoked by opponents of trade liberalization as justification for protectionist policies that thwart the goals of the GATT/WTO.⁸ The progressive nature of the current trade agenda has engendered a new round of sovereignty debate in the United States, with critics of the international trade system becoming more vocal due to the largest trade deficit in American history and a significant decline in domestic manufacturing jobs.⁹ As if the issues weren't sufficiently volatile in their own right, the debate occurs during a United States Presidential election year in which international trade, and the loss of manufacturing jobs associated with it, is a prominent campaign issue.¹⁰

While most of the current sovereignty debate among United States scholars focuses on the nation/state and its relation to the world trade system, the relationship between regional and local autonomy and the world trade system has largely been ignored.¹¹ This omission is likely based on the assumption that United States federalism in the international arena is a dead letter.¹² However, traditional notions of sovereignty are changing to

ORGANIZATION, THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION 5, 30-31 (Terence P. Stewart, ed.).

⁸ See *infra* notes 37-38 and accompanying text.

⁹ The United States 2003 trade deficit registered a record \$489.4 billion, 17.1% larger than the previous record 2002 shortfall of \$418 billion. U.S. Dep't of Commerce, Econ. and Statistics Admin., U.S. Census Bureau, U.S. Bureau of Econ. Analysis, *U.S. International Trade in Goods and Services*, (Dec. 2003) available at <http://www.bea.gov/bea/newsrelarchive/2004/trad1203.pdf>. The 2003 Economic Report of the President indicates a 16% decline in manufacturing jobs from June 2000 to December 2003, the largest decline since 1960. 2003 ECON. REPORT OF THE PRESIDENT, H. DOC. NO. 108-145, at 56 (2003).

¹⁰ Some parties to the Presidential election debate have called for a wholesale re-assessment of all international trade agreements and a possible requisite inclusion of labor and environmental standards in future trade negotiations and agreements. See e.g., A Plan For Free And Fair Trade, available at <http://www.johnkerry.com/issues/economy/trade.html> (calling for 120 day review of all existing trade agreements) (last visited Mar. 13, 2004).

The volatile nature of international trade debate during an election year became readily apparent after the release of the 2003 Economic Report of the President. See 2003 ECON. REPORT OF THE PRESIDENT, *supra* note 9. The chairman of the White House Council of Economic Advisers attempted to explain the loss of manufacturing jobs by alluding to the economic theory of comparative advantage and the loss of jobs as only "the latest manifestation of the gains from trade that economists have talked about" for years. While the theory of comparative advantage remains debatable, particularly in light of cross-border free movement of factors of production, but for the fact that this is an election year the statement likely would not have garnered much press. However, the issue has launched international trade to the center of the 2004 Presidential election debate. See Jonathan Weisman, *Bush, Adviser Assailed for Stance on 'Offshoring' Jobs*, THE WASH. POST, Feb. 11, 2004, at A6.

¹¹ See generally Spiro, *infra* note 41.

¹² Most constitutional scholars emphasize the federal government's exclusive constitutional authority to regulate foreign commerce which presumptively preempts any contrary state regulations. See JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF

include a greater role for regional and local governments in foreign affairs.¹³ Equally important, and perhaps causally linked to the changing nature of sovereignty, is the continuing evolution of the federal distribution of powers over foreign affairs, particularly in the United States. The United States Supreme Court's decisions in *Barclays Bank PLC v. Franchise Tax Board*¹⁴ and *Crosby v. National Foreign Trade Council*¹⁵ have reignited the constitutional debate regarding federal/state distribution of authority over foreign affairs. Some constitutional scholars believe *Barclays*, *Crosby* and other recent Supreme Court cases leave the door open for a resurgence of state participation in matters implicating foreign affairs.¹⁶

The new trade agenda unmistakably implicates regional and local autonomy as current and future WTO disciplines reach further and deeper into areas regulated by subfederal governmental units. The WTO also faces potentially immense challenges with respect to actions taken at the provincial level in China. While China's central government undoubtedly has the ability to preempt provincial actions, no one can predict how China's legal system will interface with the WTO, particularly in light of the fact that China is utilizing WTO membership as a springboard for fundamental structural change in its political and economic systems.¹⁷ Russia's future accession raises similar concerns as its unsettled constitutional system develops.

All of the aforementioned developments require a critical re-assessment of how the WTO addresses the regional and local governments of its Members. The key question is whether the WTO is capable of responding to an increase in non-conforming measures enacted by regional and local governments. After the enactment of the GATT, one prominent scholar described this question in the context of the United States' federal system as "whether the General Agreement actually obligates the federal government to make state governments comply with GATT rules. If not, then state laws inconsistent with GATT rules will not actually be in conflict

INTERNATIONAL ECONOMIC RELATIONS 117 (2002) ("It is reasonably well-established today that the federal government has supremacy, if it chooses to exercise it, over almost all issues that have any commercial overtones.") [hereinafter JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS]; Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States, in THE EUROPEAN COMMUNITY AND GATT* 187, 219 (Meinhard Hilf et al. eds., 1986) [hereinafter Hudec, *The Legal Status of GATT*]; Kenneth J. Cooper, *To Compel or Encourage: Seeking Compliance with International Trade Agreements at the State Level*, 2 MINN. J. GLOBAL TRADE 143, 144-45 (1993).

¹³ See Spiro *infra* note 41; see also *infra* note 47 and accompanying text.

¹⁴ 512 U.S. 298 (1994); see discussion *infra* note 79 and accompanying text.

¹⁵ 530 U.S. 363 (2000); see discussion *infra* note 83 and accompanying text.

¹⁶ See generally Spiro *infra* note 41; see also *infra* note 71 and accompanying text.

¹⁷ Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 WASH. U. GLOBAL STUD. L. REV. 97, 106 (2003).

with U.S. obligations under GATT.”¹⁸ This fundamental question remains important and, to a large degree, unanswered.¹⁹ Moreover, it must now be considered in light of new and more complex world trade disciplines, changing notions of sovereignty and federalism, and new legal systems which often defy predictability.

The GATT/WTO agreements contain multiple specific provisions addressing the distribution of power in federal systems,²⁰ all modeled after the general “federal clause” in GATT Article XXIV:12, which requires each Member to employ such “reasonable measures” as “may be available to it” to ensure compliance by regional and local governments with GATT obligations.²¹ Article XXIV:12 contains unresolved ambiguities regarding whether and to what extent federal nation/states are obligated to secure compliance by regional and local governments with GATT/WTO obligations.²² The United States has adopted conflicting positions in separate GATT disputes regarding the interpretation and application of Article XXIV:12²³ and no GATT Panel has conclusively interpreted the ambiguous provisions. While the ambiguities may have served the GATT/WTO well during its formative years, they now serve as potential impediments to the system’s growth.

This Article explores the ambiguities in the GATT/WTO regulation of federal systems and the possible need for changes to ensure future regional and local compliance with the new and diverse trade agenda being negotiated in the WTO. Part II explores the history of the GATT/WTO effort to create an international organization capable of balancing the inherent tension between supranational regulation and nation/state sovereignty. Part III reviews the distribution of power in federal constitutional systems, particularly focusing on the United States, which distributes power between national authorities and state governments. Part IV examines the United States’ implementation of its GATT/WTO obligations. Part V reviews the history and development of GATT/WTO regulation of federal systems, as embodied in GATT Article XXIV:12 and

¹⁸ Hudec, *The Legal Status of GATT*, *supra* note 12, at 219.

¹⁹ As a technical matter, unless an opposite intention is evident, any international agreement entered by the United States is binding on the states. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, U.N. Doc. A/CONF.39/27.

²⁰ *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 2.2, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, art. 13, WTO; Agreement on Technical Barriers to Trade, Apr. 15, 1994, arts. 3.1, 3.4 & 3.5, WTO; General Agreement on Trade in Services, Apr. 15, 1994, art. 1.3(a), WTO.

²¹ General Agreement on Tariffs and Trade, Apr. 15, 1994, art. XXIV:12, [hereinafter GATT].

²² *See* discussion *infra* note 145 and accompanying text.

²³ *See* *infra* note 190 and accompanying text.

GATT Panel decisions. Part VI concludes by summarizing the challenges facing the current regulatory framework and exploring options for improving compliance and regulation in this area.

II. HISTORY OF GATT/WTO INSTITUTIONAL STRUCTURE AND EVOLVING NOTIONS OF SOVEREIGNTY

In order to adequately understand how the WTO regulates the divergent political and economic systems of its Members, it is necessary first to review the “precursor” to the WTO, the GATT. The WTO itself pays homage to its GATT heritage by stipulating that “the WTO shall be guided by the decisions, procedures and customary practices followed by” the GATT parties.²⁴ During World War II, the United States and the United Kingdom began taking steps to address the economic policy mistakes that in large part lead to the outbreak of war.²⁵ In 1944 a conference was held in Bretton Woods, New Hampshire during which it was decided that the International Monetary Fund and the World Bank would be chartered to address monetary and banking issues.²⁶

After the renewal of the reciprocal trade agreements legislation in 1945, the United States and other nations began preparatory work to form an international trade system.²⁷ Out of this work emerged the GATT which was not intended to have an organizational structure but only to represent a multilateral treaty governing tariff reductions.²⁸ A draft charter establishing the International Trade Organization (“ITO”) eventually emerged but was never implemented, primarily because the United States Congress rejected it as outside the scope of the negotiating mandate provided in the renewal of the reciprocal trade agreements legislation.²⁹ Thus, out of necessity and by default, the GATT assumed an organizational structure in the void left by the rejection of the ITO.³⁰ The GATT operated under a Protocol of Provisional Application beginning on January 1, 1948 and evolved into a *de facto* organization with a GATT council and other subordinate bodies.³¹ The GATT was not an international organization with legal personality, which in addition to numerous other “birth defects,” limited its ability to

²⁴ WTO, *supra* note 20, art. XVI:1. This carries over prior GATT jurisprudence in an effort to lend security and confidence to the system.

²⁵ JOHN H. JACKSON, THE WORLD TRADING SYSTEM, LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 35-36 (2nd ed. 2000) [hereinafter JACKSON, THE WORLD TRADING SYSTEM].

²⁶ *Id.*

²⁷ *Id.* at 36.

²⁸ *Id.* at 38.

²⁹ *Id.*

³⁰ JACKSON, THE WORLD TRADING SYSTEM, *supra* note 25, at 35-36.

³¹ *Id.* at 46.

effectively regulate the conduct of the contracting parties.³² All of this changed when an agreement was reached at a ministerial meeting in Marrakesh, Morocco on April 14, 1994 establishing the WTO.

The WTO sprang from the large single undertaking negotiated during the Uruguay Round. During the latter part of the negotiations, the parties recognized the need for a supranational organization with sufficient authority to regulate the massive new agreement. In order to remedy the GATT "birth defects," an international organization was created with an organizational structure, legal personality and separate legal status.³³ The parties also reached agreement on a Dispute Settlement Understanding which goes significantly further than the GATT by providing a right to a dispute settlement panel, a reverse consensus procedure for adoption of dispute settlement reports,³⁴ and a right of appeal to an Appellate Body sitting in groups of three out of a roster of seven individuals serving on a part time basis.³⁵

The practical impact of the WTO's substantive provisions on the regulation of world trade cannot be overstated. The WTO system adds predictability to international trade, allowing members some measure of security when engaging the international marketplace. On a more fundamental level, however, the WTO represents an unprecedented transfer of sovereignty from WTO Members to the international organization sitting in Geneva, Switzerland. This fact resonated loudly in the halls of the United States Congress during consideration of the Uruguay Round agreements.³⁶ Some opponents characterized the WTO as a wholesale surrender and unconstitutional usurpation of Congress' ability to regulate foreign economic affairs,³⁷ while others argued that the WTO represented an elite international bureaucracy responding to the interests of

³² JACKSON et al., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, *supra* note 12, at 211-216.

³³ WTO, *supra* note 20, Art. VIII:1; JACKSON et al., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, *supra* note 12, at 221.

³⁴ The reverse consensus procedure provides that a report shall be adopted unless there is a consensus not to adopt. This is markedly different from the GATT procedure that required a consensus to adopt, which many believe was a major birth defect in the GATT system.

³⁵ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, arts. 6.1, 16.4 & 17.1, WTO, *supra* note 20.

³⁶ See generally John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157 (1997) [hereinafter Jackson, *The Great 1994 Sovereignty Debate*].

³⁷ See, e.g., Patrick J. Buchanan, *Fritz Hollings Derails the GATT Express*, DENVER POST, Oct. 2, 1994, at F4 ("In the World Trade Organization, established by GATT, America surrenders her national sovereignty, her freedom of action to defend her own economic vital interests from the job pillagers of Tokyo and Beijing. We give up our freedom - to foreign bureaucrats who will assume authority over America's commerce that the Founding Fathers gave exclusively to the Congress of the United States.").

multinational corporations at the expense of the United States' sovereign interests.³⁸ Supporters counterbalanced the transfer of sovereignty inherent in any international agreement with the immeasurable economic benefits attainable in efficient global free trade.³⁹ Proponents also suggested that loss of sovereignty could be mitigated by implementing legislation and by U.S. policy administration.⁴⁰

While the sovereignty debate has not waned since the United States implemented the Uruguay Round agreements, it has taken on a new dimension. Scholars now question the continuing viability of the traditional Westphalian notion of sovereignty in light of globalization and increasing world interdependence.⁴¹ A new concept of "sovereignty-modern" has been proposed to address "the use or misuse of older sovereignty thinking."⁴² This theory holds that economic "globalization," such as the availability of cheap labor, the technological advances providing new and versatile means of global communication, and the increasing involvement of local and regional authorities in international relations, has made traditional nation-states increasingly interdependent and less able to effectively regulate internal activity absent the development of institutional international control mechanisms. In the context of world trade, this theory invokes a more universal concept than the traditional parochial notion of sovereignty, which fails to recognize the inability of individual nation-states to effectively regulate in a globalized economy, and the consequent necessity of international institutions to protect market function.⁴³ Another new approach attacks the increasingly anachronistic foundation of the traditional

³⁸ *The World Trade Organization: Hearings Before the House Comm. on Ways and Means*, 103rd Cong. 69 (1994) (testimony of William A. Lovett) ("What GATT 1994 is about is institutionalizing a Brussels-like, European-style elitist bureaucracy, oriented especially to the interests of multinational corporations, and not very sensitive to many of the interests which are important in the United States.").

³⁹ *Results of the Uruguay Round Trade Negotiations: Hearings Before the S. Fin. Comm.*, 103rd Cong. 114 (1994) (testimony of John H. Jackson); *World Trade Organization: Hearing Before S. Comm. on Foreign Relations*, 103rd Cong. 857 (1994) (testimony of John H. Jackson); *Trade Agreements Resulting From The Uruguay Round of Multilateral Trade Negotiations: Hearings Before the Subcomm. On Trade of the House Comm. on Ways and Means*, 103rd Cong. 814 (1994) (written submission of Terence P. Stewart).

⁴⁰ Written Submission of Terence P. Stewart, *supra* note 39; Testimony of John H. Jackson Before S. Comm. on Foreign Relations, *supra* note 39; see also Matthew Schaefer, *Sovereignty, Influence, Realpolitik and the World Trade Organization*, 25 HASTINGS INT'L & COMP. L. REV. 341, 345 (2002).

⁴¹ See, e.g., John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L., 782, 786 (Oct. 2003) [hereinafter Jackson, *Sovereignty-Modern*]; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 668-69 (2002) [hereinafter Spiro, *Globalization*].

⁴² Jackson, *Sovereignty-Modern*, *supra* note 41, at 785.

⁴³ *Id.* at 798-99.

protectionist argument that nation-state sovereignty is threatened by the expansion of international institutions.⁴⁴ This “sovereignty-strengthening” theory suggests that international institutions such as the WTO actually strengthen nation-state sovereignty. The assumption is that “changes in the international system or in domestic politics have already compromised sovereignty in an irrevocable manner, and thus international institutions, while rendering the erosion of sovereignty more legible, actually serve as a means to reassert or reclaim sovereignty.”⁴⁵

As the debate continues and traditional notions of nation-state sovereignty evolve, the impact of globalization and supranational regulation of trade on the autonomy of subsidiary governments located within nation-states must be reassessed. This subject has largely been ignored in the current international sovereignty debate. One notable exception is the expansion of the “disaggregated state” theory.⁴⁶ In contrast to the “upward” transfer of sovereign authority from nation-states to international institutions, the “disaggregated state” theory focuses on the “downward” transfer of power from the nation-state to regional and local governments. As nation-states become more interconnected and interdependent, centralized international relations dependent upon central government control decline.⁴⁷ This in turn leads to a dilution of central government responsibility and a fundamental shift in the institutional structure of the global system, forcing a re-examination of old constitutional and international norms in light of the new circumstances.⁴⁸ As the major proponent of this theory describes it:

The institutionalization of interstate relations, the disaggregation of the state, and economic globalization all suggest foundational shifts in the structure of the global system. To the extent constitutional doctrines have been grounded in the old framework, they must be reexamined against the new. Frameworks conceived in other times may emerge inappropriate in the changed global context.⁴⁹

As a consequence of these fundamental structural changes, this theory

⁴⁴ Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841 (December 2003).

⁴⁵ *Id.* at 843.

⁴⁶ The original “disaggregated state” theory was developed by Professor Anne-Marie Slaughter. See Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997 at 183.

⁴⁷ Spiro, *Globalization*, *supra* note 41, at 668-69.

⁴⁸ *Id.* at 674-75.

⁴⁹ *Id.* at 673. Professor Spiro even suggests that the international rule of state responsibility for the conduct of its constituent elements may need modification in light of state disaggregation. *Id.* at 671.

concludes that “states and other subfederal actors should no longer suffer any constitutional bar from foreign policy-making activities.”⁵⁰

The constitutional legitimacy of the assertion that state governments in the United States should now have free reign to engage in foreign policy-making is far from certain.⁵¹ However, there is no question that the post-cold war world has undergone a fundamental shift of traditional power structures with lasting implications on the autonomy of regional and local governments throughout the world. As technology and communication costs decrease and the world becomes increasingly interdependent, the ability of regional and local actors to engage and impact foreign affairs and commerce increases exponentially.⁵² Indeed, where most localities used to have sporadic contact with foreign governments, they now have routine contacts and well-established relationships.⁵³ The emergence of regional and local governments on the world scene, coupled with an aggressive trade agenda encompassing politically sensitive areas to some degree under the control of these local entities, increases the potential for disguised restrictions on trade and other protectionist measures which could thwart trade liberalization. As most of the negative fluctuations created by international trade liberalization (i.e., loss of jobs) are borne at the local level, the likelihood of trade restrictions emanating from the local level increases. The current debate in the United States over international trade policy is just one example of the appeal of local protectionism to regional powers facing the negative effects of trade.⁵⁴

⁵⁰ *Id.* at 686. One proponent of the theory has even questioned the continuing viability of the *Charming Betsy* canon of judicial construction, which requires a statutory construction of domestic federal statutes that complies with international law obligations. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484-85 (1998). At least one recent federal appellate court decision has marginally called the *Charming Betsy* canon into question. See *Timken Co. v. United States*, 354 F.3d 1334, 1343-44 (Fed. Cir. 2004) (upholding Department of Commerce zeroing practice in anti-dumping investigations despite WTO decision finding similar practice by European Community as a violation of GATT/WTO rules).

⁵¹ See generally *infra* Section III.

⁵² See Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 924-25 (2003); Spiro, *Globalization*, *supra* note 41, at 667-71.

⁵³ Spiro, *Globalization*, *supra* note 41, at 669. From 1982 to 1994, state governments in the United States almost tripled their number of overseas offices. In 1990, eight Canadian provinces maintained overseas offices, spending more on international trade activities than the state governments of the United States. See Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives Challenges to Sovereignty and Governance*, 20 CAN.-U.S. L.J. 303, 309-10 (1994).

⁵⁴ See *supra* note 9 and accompanying text.

III. DISTRIBUTION OF FOREIGN AFFAIRS POWER IN FEDERAL CONSTITUTIONAL SYSTEMS

In order to appreciate how the GATT/WTO system regulates federal nation-states, we must first examine how federal nation-states constitutionally distribute foreign affairs power.⁵⁵ This Article focuses on the distribution of foreign affairs power in the United States. However, there are other WTO Members with political and economic systems that pose similar, and in some respects more difficult, compliance problems. Canada, for instance, has a somewhat weak federal tradition with significant authority over international trade issues reserved to the provinces.⁵⁶ The European Union is another example, which some view as an evolving federal state as opposed to an international organization.⁵⁷ China's recent accession to the WTO poses its own unique challenges⁵⁸ and Russia's future accession will raise similar concerns.

It goes without saying that the United States federal government holds a preeminent position over states with respect to foreign affairs. The President of the United States has considerable latitude and authority over non-economic foreign affairs issues. This authority emanates from Article II Constitutional delegations appointing the President Commander in Chief, granting the President the treaty power (with the advice and consent of the Senate) and charging the President with the appointment of ambassadors.⁵⁹ Most Presidential power over foreign commerce must be delegated from Congress, which under the Commerce Clause has authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁶⁰ The Supremacy Clause accords supremacy to federal laws enacted pursuant to the commerce power.⁶¹ Article III extends the federal judicial power to cases involving federal enactments and other transnational controversies.⁶² The states are constitutionally prohibited from executing treaties, entering into agreements with other countries, or imposing duties on imports or exports.⁶³ Federal authority is limited by the Tenth Amendment to the United States Constitution which provides that "[t]he

⁵⁵ The phrase "foreign affairs" is used throughout this article in a broad sense to include any activities implicating international affairs, including foreign policy and commerce.

⁵⁶ JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 25, at 89; James P. McIlroy, *NAFTA and the Canadian Provinces: Two Ships Passing in the Night?*, 23 CAN-U.S. L.J. 431, 438 (1997).

⁵⁷ JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 25, at 100.

⁵⁸ *See supra* note 17.

⁵⁹ U.S. CONST. art. II, § 2, cls. 1,2.

⁶⁰ *Id.* at art. I, § 8, cl. 3.

⁶¹ *Id.* at art. VI, § 1, cl. 2.

⁶² *Id.* at art. III.

⁶³ *Id.* at art. I, § 10, cls. 1-3.

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁶⁴

The United States Supreme Court has recognized that the Commerce Clause “limits the power of the States to erect barriers against interstate trade.”⁶⁵ The Court expanded the domestic commerce power into a dormant foreign affairs power excluding the states from activity implicating foreign affairs, even in the absence of contrary federal action.⁶⁶ The two most notable decisions establishing federal exclusivity over foreign affairs are *Japan Line, Ltd. v. County of Los Angeles*⁶⁷ and *Zschernig v. Miller*.⁶⁸ *Japan Line* reinforced the prohibition against state regulations implicating foreign commerce by invalidating a California *ad valorem* property tax imposed on foreign-owned cargo containers involved in international commerce.⁶⁹ *Zschernig* broadly condemned state activity having “more than some incidental or indirect effect” on foreign relations by striking down a state probate measure discriminating against residents of Eastern bloc nations.⁷⁰

Even though *Japan Line* and *Zschernig* remain valid precedent, there is substantial evidence that the Supreme Court is softening the default rule against state involvement in foreign affairs.⁷¹ The trend began with the arrival of Associate Justice William Rehnquist and the Court’s subsequent domestic federalism decisions.⁷² The foundation for this shift was laid in *Gregory v. Ashcroft*,⁷³ where Justice O’Connor elucidated themes that would predominate later pro-states opinions. “As every schoolchild learns,

⁶⁴ U.S. CONST. amend. X.

⁶⁵ *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980).

⁶⁶ *See, e.g., United States v. Pink*, 315 U.S. 203, 233-34 (1942) (executive agreement trumps state law); *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (treaty power extends to issues with international concern).

⁶⁷ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

⁶⁸ *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁶⁹ *Japan Line*, 441 U.S. at 448-49 (state law can violate the dormant foreign commerce clause by impeding federal government’s ability to speak with “one voice” in foreign affairs).

⁷⁰ *Zschernig*, 389 U.S. at 434.

⁷¹ Spiro, *Globalization*, *supra* note 41, at 695; Goldsmith, *infra* note 82; James J. Pascoe, *Time for a New Approach? Federalism and Foreign Affairs After Crosby v. National Foreign Trade Council*, 35 VAND. J. TRANSNAT’L L. 291, 305 (Jan. 2002).

⁷² *See* Chiang, *supra* note 52 at 951 (“More generally, the legacy of the Rehnquist Court in particular may be the Court’s reevaluation of long-standing principles of federalism and the proper balance of power between the state and federal governments, resulting in a distinct and definite shift in authority from the latter to the former.”).

⁷³ *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Missouri statute imposing mandatory judicial retirement age upheld despite contrary provision in federal Age Discrimination in Employment Act).

our Constitution establishes a system of dual sovereignty between the States and the Federal Government” which affords states “substantial sovereign authority.”⁷⁴ Similarly, in *New York v. United States*, Justice O’Connor reiterated that:

[t]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.⁷⁵

Justice O’Connor went on to stress that:

[w]hile Congress has substantial powers to govern the nation directly, including areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.⁷⁶

These pro-states themes culminated in the landmark *United States v. Lopez* decision in which the Court, for the first time since 1937, struck down a federal statute enacted pursuant to the Commerce Clause.⁷⁷

The aforementioned domestic federalism decisions undoubtedly influenced the Court’s recent decisions softening the federal dormant foreign affairs power doctrine.⁷⁸ The first such decision arrived in 1994 when the Court in *Barclays Bank PLC v. Franchise Tax Board*⁷⁹ upheld the constitutionality of a California corporate tax scheme that taxed multinational corporations doing business in California by reviewing their worldwide income and taxing that portion attributable to California operations. This “worldwide combined reporting” scheme generated enormous dissent from foreign countries and conflicted with the federal government’s “separate accounting” system which treats each corporate

⁷⁴ *Id.* at 457.

⁷⁵ *New York v. United States*, 505 U.S. 144, 157 (1992) (federal Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional intrusion on state prerogatives).

⁷⁶ *Id.* at 162.

⁷⁷ *United States v. Lopez*, 514 U.S. 549, 567 (1995). (Gun Free School Zones Act, which made it a federal offense to possess a firearm in a school zone, struck down because “possession of a gun in a local school zone is in no sense economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”). For additional states’ rights or federalism cases, see *Printz v. United States*, 521 U.S. 898 (1997); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000).

⁷⁸ See Spiro, *Globalization*, *supra* note 41, at 695.

⁷⁹ *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 302-03 (1994).

entity separately for tax purposes.⁸⁰ Some view the *Barclays Bank* decision as an unprecedented assault on the *Japan Line* “one voice” tradition because the state measure had significantly more than a “potential” to interfere with foreign relations.⁸¹ Others have even suggested that *Barclays* “marks the end of all dormant foreign affairs preemption doctrines.”⁸²

The next major Supreme Court decision involving international federalism is perhaps best known not for its affirmative ruling but for the issues it avoided. The Court’s 2000 decision in *Crosby v. Nat’l Foreign Trade Council*⁸³ sparked wide debate regarding state regulations impacting foreign affairs and the continuing viability of the dormant foreign affairs doctrine espoused in *Japan Line* and *Zschernig*.⁸⁴ In *Crosby*, the Court was asked to evaluate the constitutionality of a 1996 Massachusetts procurement law restricting state purchases of goods and services from companies doing business with the Union of Myanmar (“Burma”). Massachusetts promulgated the law in order to express its condemnation of Burmese human rights violations by using its economic authority to encourage companies to stop doing business in Burma. The federal government passed a similar law three months later, which served as the basis for the Supreme Court’s decision invalidating the Massachusetts law on preemption grounds.⁸⁵ Before the ultimate preemption decision by the Supreme Court, the Massachusetts law met with considerably broader constitutional disapproval in the lower courts.

The National Foreign Trade Council filed suit in 1998 alleging that the Massachusetts law was infirm on three grounds: the federal foreign affairs power, the Foreign Commerce Clause and the Supremacy Clause. In November 1998, the U.S. District Court for Massachusetts struck down the Burma law as an impermissible infringement on the federal foreign affairs power, noting federal plenary power over foreign affairs and the Supreme

⁸⁰ *Id.* at 303-06.

⁸¹ See Spiro, *Globalization*, *supra* note 41, at 695.

⁸² Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 212 (2001); see generally Jack L. Goldsmith, *Federal Courts, Federalism, and Foreign Affairs*, 83 VA. L. REV. 1617 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999). *Contra* Chiang, *supra* note 52, at 954-55.

⁸³ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

⁸⁴ The state regulation at issue in *Crosby* also sparked a complaint by the European Community and Japan under the WTO Dispute Settlement Understanding. See WTO, *Panel Established in Government Procurement Dispute* (“The Dispute Settlement Body (DSB), on 21 October, established a panel to examine complaints by the European Communities and Japan that a Massachusetts law had violated provisions of the plurilateral Agreement on Government Procurement”) (Oct. 29, 1998) available at http://www.wto.org/english/news_e/news98_e/wdsboct.htm

⁸⁵ *Crosby*, 530 U.S. at 364.

Court's recognition of federal exclusivity in foreign affairs.⁸⁶ The First Circuit affirmed the district court's invalidation of the law on three independent grounds.⁸⁷ First, the appellate court agreed with the district court and affirmed the law's invalidity as an unconstitutional interference with the federal foreign affairs power based on the Supreme Court's *Zschernig* decision.⁸⁸ Second, the First Circuit found the Massachusetts law invalid under the Foreign Commerce Clause.⁸⁹ Finally, the First Circuit found the state law preempted by its federal counterpart.⁹⁰

In a significantly shorter and substantively narrower opinion, the United States Supreme Court affirmed the invalidity of the Massachusetts law solely on the basis of preemption.⁹¹ The Supreme Court abstained from examining the full array of constitutional issues presented by the Massachusetts law and addressed by the First Circuit.⁹² The Court's failure to address the substantive issues of foreign affairs and foreign commerce has spurred much academic debate and speculation regarding the continuing viability of the *Japan Line* and *Zschernig* cases.⁹³ Some believe that *Crosby*'s narrow holding is an affirmation of the Court's continuing trend toward greater states' rights and leaves the door open for a reversal of the

⁸⁶ Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 290-91 (D. Mass. 1998) (citing U.S. Const. art. I, § 8, cls. 1, 3 (common defense), art. II, § 2, cl. 2 (treaty power), art. I, § 10, cls. 1-3 (state prohibitions), *Zschernig*, 349 U.S. at 434-35 & 441 (state laws with indirect or incidental effect in foreign countries and potential for disruption are unconstitutional); *United States v. Pink*, 315 U.S. 203, 233 (1942) (exclusive federal power over external affairs)).

⁸⁷ Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999).

⁸⁸ *Id.* at 45. The Court found that the law had more than an "incidental or indirect effect" in foreign countries. *Id.* at 52 (quoting *Zschernig*, 389 U.S. at 434).

⁸⁹ *Id.* at 45. The Court ruled that Massachusetts was not acting as a market participant but rather as a market regulator in that its law imposed sanctions related to activities that have no connection to Massachusetts. *Id.* at 63. The Court further conveyed its skepticism as to whether the Foreign Commerce Clause even has a market participant exception. *Id.* at 65-66.

⁹⁰ *Natsios*, 181 F.3d at 45.

⁹¹ *Crosby*, 530 U.S. at 373.

⁹² *Id.* at 374 (Court declined "to speak to field preemption as a separate issue . . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause."). Some of the amicus curiae briefs in support of the Massachusetts law highlighted the Court's recent states' rights decisions in *Lopez*, *New York* and *Barclays Bank* as justification for upholding the statute. See generally Brief for Amici Curiae States, *Crosby v. Nat'l Foreign Trade Council*, 1999 WL 33611395; Brief for Amicus Curiae Coalition for Local Sovereignty, *Crosby v. Nat'l Foreign Trade Council*, 2000 WL 27690.

⁹³ See Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); Daniel Halberstam, *The Foreign Relations of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015 (2001); Goldsmith, *supra* note 82.

dormant foreign affairs doctrine in an appropriate case.⁹⁴

The Supreme Court recently issued another decision implicating the relationship between the federal foreign affairs power and the ability of states to participate in activities implicating foreign relations. In a splintered 5-4 opinion, the Supreme Court invalidated the California Holocaust Victim Relief Act which required insurers doing business in California to disclose information regarding insurance policies sold in Europe between 1920 and 1945.⁹⁵ The Court ruled that the California statute impermissibly interfered with the President's ability to conduct foreign affairs in light of various executive agreements entered by the President to resolve unpaid insurance claims owed to Nazi victims.⁹⁶ Thus, the Court found that the California statute conflicted with federal law and invalidated it under an implied preemption theory as an impermissible encroachment on the President's inherent foreign affairs power.⁹⁷ The dissenting opinion departed from the majority by finding that, in the absence of an express intention in the federal law to preempt state action, the state law which merely required disclosure of certain information, does not compromise "the President's ability to speak with one voice for the Nation."⁹⁸

The impact of *Garamendi* on the ongoing debate over federal/state distribution of powers over foreign affairs is limited. The Court struck down the law in light of the wide latitude afforded the Executive in foreign affairs, but it does not resolve the "dormant foreign commerce" issue originating in *Zschernig* and addressed in *Barclays Bank*.⁹⁹ In fact, the Court specifically distinguished *Barclays Bank* on the ground that it involved foreign commerce power and not foreign policy, in which the President retains the lead role.¹⁰⁰ This distinction needs Court clarification, because globalization has caused virtually everything, including economic

⁹⁴ See Spiro, *Globalization supra* note 41, at 696 ("In short, *Crosby* may well emerge as a transitional case on the way to a more permissive doctrinal regime for state foreign policy-making, as evidenced by other developments."); Pascoe, *supra* note 71 (adopting revisionist view of federal foreign affairs in which states assume status of demi-sovereigns under international law); Peter Spiro, *Cities, States, and Foreign Affairs: The Massachusetts Burma Case and Beyond*, 21 BERKELEY J. INT'L L. 146 (2003). *Contra* David M. Golove, *The Implications of Crosby for Federal Exclusivity in Foreign Affairs*, 21 BERKELEY J. INT'L L. 152 (2003) ("*Crosby* suggests that dormant foreign affairs preemption is still a vital, if limited, doctrine.").

⁹⁵ *Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2379 (2003).

⁹⁶ *Id.* at 2381-82.

⁹⁷ *Id.*

⁹⁸ *Id.* at 2401 (Ginsburg, J., dissenting).

⁹⁹ See Brannon P. Denning, *International Decisions*, 97 AM. J. INT'L L. 950, 958 (2003).

¹⁰⁰ *Garamendi*, 123 S.Ct. at 2321 n.12.

matters, to at least marginally implicate foreign affairs.¹⁰¹

At the end of the day, the current constitutional role of the states in foreign affairs remains unclear. On one hand, the traditional orthodox view adopts an “exclusivity principle,” under which the federal government enjoys exclusive authority over foreign affairs.¹⁰² On the other hand, a revisionist view is challenging the foundation of the orthodox view in light of globalization and changing notions of sovereignty.¹⁰³ To the extent the Supreme Court’s recent cases highlight a fundamental shift towards greater state participation in foreign affairs, the potential implications for the world trading system are significant.

For example, if Massachusetts’ law regarding Burma in *Crosby* had been sustained as a valid exercise of state constitutional authority, the United States would have had to defend the measure in the dispute settlement proceeding initiated by the European Community and Japan. No doubt the United States would have invoked Article XXIV:12 as an exception because no “reasonable measures” would have been constitutionally “available to it” to ensure Massachusetts’ compliance with GATT/WTO obligations. Could the United States properly invoke Article XXIV:12 as an exemption to providing compensation to other WTO Members negatively impacted by the Massachusetts law? As will be discussed in Part V *infra*, even though the Understanding on Article XXIV reaffirms nation/state responsibility for acts or omissions of its component government units, neither the Understanding nor any of the relevant Panel decisions answer the question of what a Member must do when the subject matter of the measure at issue falls within the constitutional prerogative of a subfederal unit. This predicament may become more prevalent as the WTO completes negotiations on existing topics and adds new disciplines reaching into areas regulated (or potentially regulated) by regional and local governments and as the distribution of power in federal states evolves toward greater local participation.

IV. U.S. IMPLEMENTATION OF GATT/WTO OBLIGATIONS

As noted in Part I, supporters of the Uruguay Round agreements countered loss of sovereignty arguments by emphasizing the United States’ ability to mitigate such loss in its implementing legislation.¹⁰⁴ The GATT was never actually implemented by Congress and applied provisionally

¹⁰¹ See generally THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE, UNDERSTANDING GLOBALIZATION* (Anchor Books 2000) (1999).

¹⁰² See Pascoe, *supra* note 71, at 303-06.

¹⁰³ *Id.* at 306-07.

¹⁰⁴ See Written Submission of Terence P. Stewart, *supra* note 39; Testimony of John H. Jackson Before Foreign Relations Comm., *supra* note 39; Schaefer, *supra* note 40.

under the Protocol of Provisional Application for 50 years.¹⁰⁵ Unlike the GATT, the Uruguay Round agreements establishing the WTO were submitted to Congress pursuant to the fast track procedure for approval of Congressional-Executive agreements.¹⁰⁶ Congressional-Executive and other international agreements enter United States law in one of two ways.¹⁰⁷ First, the agreement's terms may indicate that it is self-executing, in which case it enters United States law directly.¹⁰⁸ Second, if the agreement's terms do not indicate that it is self-executing (including explicit calls for implementing legislation), then it enters United States law only after enactment of separate Congressional implementation legislation or an executive proclamation pursuant to prior Congressional authorization.¹⁰⁹ Once the international agreement is thus implemented, it becomes directly applicable federal law and attains equal rank with other federal law.¹¹⁰

Importantly, the implementing legislation does not always mirror the language of the international agreement, leaving open the possibility that subsequent regulatory actions could comply with domestic law (the implementing legislation), but conflict with the international agreement. In that situation, the United States could be in violation of the rule of customary international law disallowing treaty parties to invoke domestic law as a basis for violation of an international obligation.¹¹¹

The Uruguay Round agreements were not self-executing and therefore required Congressional implementation in order to enter U.S. law.¹¹² The agreements were signed on April 15, 1994 and Congress subsequently worked with the Office of the United States Trade Representative to develop implementing legislation.¹¹³ The question of state compliance was heavily debated in the ensuing discussions.¹¹⁴ A major concern of the states was the potential for the wide-ranging agreements to invalidate state laws in areas "such as economic regulation, environmental affairs, product safety and health standards, etc. (insofar as these were left to the states by Congress or other federal bodies)."¹¹⁵ In fact, an association of state

¹⁰⁵ Jackson, *supra* note 36, at 163.

¹⁰⁶ *Id.* at 168.

¹⁰⁷ Hudec, *The Legal Status of the GATT*, *supra* note 12, at 188-91.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 190.

¹¹¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, U.N. Doc. A/CONF.39/27.

¹¹² Jackson, *supra* note 36, at 168.

¹¹³ *Id.* at 169.

¹¹⁴ *Id.* at 185.

¹¹⁵ *Id.*

Attorneys General submitted “sub-federal sovereignty objections” to the agreements.¹¹⁶

On September 27, 1994 the President submitted a Statement of Administrative Action (“SAA”) to Congress accompanying the implementing bill for the Uruguay Round agreements.¹¹⁷ Congress approved the implementing bill and the SAA, which constitutes “an authoritative expression” by the United States concerning the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law.¹¹⁸ Section 102(b) of the implementing legislation governs the relationship of the Uruguay Round agreements and state law.¹¹⁹

The SAA extensively discusses section 102(b) and the relationship between the agreements and state law and highlights the various substantive and procedural protections afforded to the states in implementing the legislation, all of which significantly alter the relationship between the agreements and state law.¹²⁰ At the outset, the SAA declares that “the Uruguay Round agreements do not automatically ‘preempt’ or invalidate state laws that do not conform to the rules set out in those agreements – even if a dispute settlement panel were to find a state measure inconsistent with such an agreement.”¹²¹ Section 102(c) of the implementing legislation precludes private rights of action against state governments on the basis of a provision of the agreements; only the federal government may commence such an action.¹²² In such a challenge, the United States may not introduce any WTO panel or Appellate Body report as evidence of non-conformity and must restrict its argument(s) to the treaty text.¹²³ As of today, no such action has been initiated to invalidate a state law.¹²⁴

Section 102(b) establishes a procedure for federal/state consultations

¹¹⁶ *Id.*

¹¹⁷ Statement of Administrative Action for the Uruguay Round Trade Agreements, tit. I, § 101, H.R. Doc. No. 103-316, 103rd Cong. (2d Sess. 1994) [hereinafter SAA].

¹¹⁸ 19 U.S.C. 3511 § 101(a).

¹¹⁹ *Id.* at § 102(b).

¹²⁰ SAA, *supra* note 117, at 670-77, 696 (general discussion); SAA, *supra* note 117, at 754-55 (Sanitary and Phytosanitary Agreement); SAA, *supra* note 117, at 779, 782-83 (Technical Barriers to Trade Agreement); SAA, *supra* note 117, at 297 (General Agreement on Trade in Services).

¹²¹ *Id.* at 670. As discussed in Section V *infra*, this language further complicates Article XXIV:12.

¹²² *Id.* at 676.

¹²³ 19 U.S.C. 3501.

¹²⁴ The Court of International Trade has proposed to assume concurrent jurisdiction with United States District Courts over claims brought pursuant to 19 U.S.C. § 3512(b)(2). See *The Customs and International Trade Courts Improvement Act of 2003*, proposed 28 U.S.C. § 1582(c) (copy available from author upon request).

to secure U.S. compliance with its international obligations “through the greatest possible degree of state-federal consultation and cooperation . . .”¹²⁵ As will be discussed in greater detail in Part VI, *infra*, the SAA calls for consultations with an intergovernmental policy advisory committee along with a “WTO Coordinator for State Matters” in the Office of the United States Trade Representative.¹²⁶

V. GATT/WTO REGULATION OF FEDERAL NATION/STATES

As a general rule, customary international law imposes responsibility on federal nation/states for acts or omissions of their component governmental units, that violate international obligations of the nation/states.¹²⁷ This obligation exists even where the internal law of the federal nation/state does not provide authority to compel compliance by the component governmental units.¹²⁸ This customary international law obligation applies as the default rule unless a contrary intention is evidenced in the text of the international treaty.¹²⁹ Thus, the first question to ask when examining international regulation of federal nation/states is whether the treaty language evidences an intention to “opt out” of the default rule of nation/state responsibility for subfederal governmental units. While there was some early doubt with respect to the intentions of the contracting parties in GATT, there is now no question that federal GATT/WTO Members remain fully responsible for the actions of their component governmental units.¹³⁰

There is no customary international law rule regarding what measure(s), if any, central governments must take to seek compliance at the local level. The GATT and ITO negotiators foresaw the potential problem federal constitutional systems could pose to an international trading system. In short, the issue is whether the central governments in federal nation/states can ensure regional and local observance of GATT obligations, and if not, how the international system should induce the central governments to seek compliance. The principal GATT provision addressing this issue is Article XXIV:12, which provides that “[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.”¹³¹

¹²⁵ *Id.* at 670.

¹²⁶ *Id.* at 671.

¹²⁷ Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, U.N. Doc. A/CONF.39/27 (1969).

¹²⁸ *Id.*

¹²⁹ *Id.* at art. 29.

¹³⁰ See *infra* note 155 and accompanying text.

¹³¹ GATT, art. XXIV, para. 12.

A. Preparatory History of GATT Article XXIV:12

The language of Article XXIV:12 directly descends from language in the draft ITO Charter.¹³² During the 1946 GATT and ITO preparatory session, negotiators offered various justifications for inclusion of the “federal clause” now represented by Article XXIV:12, all of which illustrate the struggle to integrate federal systems into the international trade superstructure. Australia expressed its concern in the context of the draft rule preventing discrimination in internal tax and regulatory provisions.

Australia anticipates considerable difficulty in giving full effect to the operation of this section. Differences in treatment of domestic and imported goods (and in some cases between British and “Foreign” imported goods) occur in both Commonwealth and State practice.

Where such differences occur in Commonwealth laws, e.g. Excise and Sales Tax, steps could over a period be taken to remove differentiation. Where the matter is one solely of action by a State, and our “external powers” laws do not give the Commonwealth authority to act, we would agree to use our best efforts to secure modification or elimination of any practice regarded as discriminatory.¹³³

A United States negotiator echoed a similar concern regarding the draft rule on government procurement practices.

The obligation to accord fair and equitable treatment in awarding contracts applied to both central and local governments where the central government was traditionally or constitutionally able to control the local government. Although he could not speak decisively, he thought that the United States Government would be able to control actions of states in this matter.¹³⁴

A technical subcommittee reporting on the draft national treatment article reported the concern among several countries regarding application of the non-discrimination principle.

However, some countries called attention to practices which might be contrary to this principle and suggested reservation for further discussion bilaterally or ample time for their elimination. Several countries emphasized that central governments could not in many cases control subsidiary governments in this regard, but agreed that all should

¹³² John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 304 n. 290 and sources cited therein [hereinafter Jackson, *The General Agreement on Tariffs and Trade*].

¹³³ U.N. Doc. EPCT/C.II/5, at 1 (1946).

¹³⁴ U.N. Doc. EPCT/C.II/27, at 1 (1946).

take such measures as might be open to them to ensure the objective.¹³⁵

In response to these concerns, the technical subcommittee submitted the addition of a clause to the national treatment article requiring contracting parties to take “all measures” open to them to ensure that taxes and other regulations by subsidiary governments within their territories did not impair the objectives of the national treatment article.¹³⁶ The language of this “federal clause” was later changed to require each government to “take such reasonable measures as may be available to it” to ensure observance by subsidiary governments¹³⁷ and the entire “federal clause” was moved to a general miscellaneous article to reflect the fact that the problem of federal/state distribution of power applied to other substantive provisions of the GATT as well.¹³⁸ This version of the “federal clause” made its way into the draft GATT and, with some changes, the ITO Charter.¹³⁹ This is the version currently contained in GATT Article XXIV:12.

Various contracting parties sought to strengthen the “federal clause” to require central governments to ensure compliance by regional and local governments. The United States responded to a Chinese proposal to alter the “reasonable measures” language by noting that “it is necessary to distinguish between central or federal governments, which undertake these obligations in a firm way, and local authorities, which are not strictly bound, so to speak, by the provisions of the Agreement, depending of course upon the constitutional procedure of the country concerned.”¹⁴⁰ The federal clause withstood a proposed amendment by Mexico during the Havana Conference which would have significantly altered the clause by imposing full responsibility upon federal states for the non-conforming actions of regional and local governments and by requiring the federal states to take “all necessary measures” to bring the measure into

¹³⁵ U.N. Doc. EPCT/C.II/54, at 4 (1946).

¹³⁶ *Id.* at 6.

¹³⁷ An explanatory note was added with respect to GATT art III:1 in order to deal with existing legislation. The explanatory note specifies that while internal taxes imposed by local governments and authorities are subject to art XXIV:12, the term “reasonable measures” would not require “the repeal of existing national legislation authorizing local governments to impose internal taxes . . . if such repeal would result in serious financial hardship . . .” Moreover, the term “reasonable measures” would allow a contracting party to “eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.” GATT art. III.

¹³⁸ Jackson, *The General Agreement on Tariffs and Trade*, *supra* note 132, at 306.

¹³⁹ *Id.*

¹⁴⁰ Amelia Porges, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 830, (6th ed. 1995) (citing EPCT/TAC/PV/19, at 33) [hereinafter GATT, ANALYTICAL INDEX].

compliance.¹⁴¹ The amendment would have changed the language to read:

Each Member shall take all necessary measures to assure observance of the provisions of this Charter by the regional and local governments and authorities within its territory and shall be responsible for any act or omission to act contrary to the provisions of this Charter on the part of any such government or authorities.¹⁴²

This proposed amendment goes much further than the current provision by requiring “all necessary measures” to ensure observance.¹⁴³ Mexico eventually withdrew the proposal in light of constitutional difficulties expressed by certain delegates in enforcing the provisions of the amendment.¹⁴⁴

Throughout the application of the GATT under the Protocol of Provisional Application, scholars recognized that Article XXIV:12 contained an inherent ambiguity subjecting it to two different interpretations.¹⁴⁵ On the one hand, Article XXIV:12 could be interpreted to recognize that in federal systems certain matters are within the legal power of subfederal governments and beyond the control of the central arm of government.¹⁴⁶ In those situations, the central government does not violate its GATT treaty obligation when the subfederal government enacts GATT-inconsistent measures as long as the central government does everything within its power to ensure local compliance.¹⁴⁷

A second interpretation of Article XXIV:12 indicates that GATT was not intended to apply to subfederal governments at all and even where the central government has the authority to require local compliance, it is under no obligation to do so, but merely to take “reasonable measures.”¹⁴⁸ If the second interpretation is correct, then GATT cannot be invoked as a matter of law in proceedings involving conflicting state laws.¹⁴⁹ Several U.S. state courts addressed this issue and essentially adopted the first interpretation by

¹⁴¹ *Id.* (citing E/CONF.2/C.6/48/Rev.1, at 4).

¹⁴² United Nations Conference on Trade and Employment (Havana, November 1947 to March 1948), Committee VI, Organization, U.N. Doc. E/CONF.2/C.6/12 (1948).

¹⁴³ See *infra* note 215.

¹⁴⁴ *United Nations Conference on Trade and Employment* (Havana, November 1947 to March 1948), 6th Comm., U.N. Doc. E/CONF.2/C.6/12 (1948).

¹⁴⁵ See Hudec, *The Legal Status of GATT*, *supra* note 12, at 219-221; Jackson et al., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS*, *supra* note 12, § 6.7(B), at 242-244.

¹⁴⁶ Jackson et al., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS*, *supra* note 12, § 6.7(B), at 242.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

ruling that GATT, as part of federal law, prevails over conflicting state law.¹⁵⁰

While the referenced U.S. state court cases support the first interpretation, various United States officials assumed the opposite position over the years by failing to acknowledge GATT's preemption of state law. During a 1949 hearing before the United States Senate Finance Committee, a U.S. State Department official took the position that Article XXIV:12 only obligates the federal government to persuade states to voluntarily comply with GATT.¹⁵¹ This position was later adopted in a State Department letter to the Hawaii Territorial Supreme Court in *Hawaii v. Ho*,¹⁵² wherein the State Department Legal Advisor noted that the obligation to take "reasonable measures" to obtain observance by local authorities with respect to local GATT-inconsistent laws indicates that "as a matter of law the General Agreement did not override such laws."¹⁵³ The position was again affirmed during implementation of the 1979 Tokyo Round Standards Code when both Congress and the Executive branches related that "reasonable measures" in the Standards Code required the federal government only to make "polite requests for voluntary compliance by state governments."¹⁵⁴

The Uruguay Round negotiators attempted to address the inherent ambiguities in Article XXIV:12 by adopting an Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994. With respect to Article XXIV:12, the Understanding provides that "[e]ach Member is fully responsible under the GATT for the observance of all provisions of the GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory."¹⁵⁵ The Understanding also makes clear that the provisions of the Dispute

¹⁵⁰ See *Hawaii v. Ho*, 41 Haw. 565 (1957) (Hawaii territorial law requiring signage indicating sale of foreign eggs conflicted with GATT national treatment obligation); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Commission*, 381 A.2d 774 (N.J. 1977) (recognition of GATT as superior to conflicting state law but finding no conflict between local measure and GATT obligations). For a general discussion of these and other cases see Hudec, *supra* note 12, at 221-225.

¹⁵¹ Jackson, *The General Agreement on Tariffs and Trade*, *supra* note 132, at 303-304 (quoting testimony from *Hearings on H.R. 1211 Before the Senate Comm. on Finance, Extension of Reciprocal Trade Agreements Act*, 81st Cong 1161-62 (1949)).

¹⁵² See *supra* note 150.

¹⁵³ Jackson, *The General Agreement on Tariffs and Trade*, *supra* note 132, at 303 (quoting Letter from Herman Phleger, Legal Adviser of the Department of State, to Mr. Sharpless, Acting Attorney General of Hawaii (February 26, 1957)).

¹⁵⁴ Hudec, *supra* note 12, at 220.

¹⁵⁵ Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, XXIV: 12, ¶13.

Settlement Understanding “may be invoked in respect of measures affecting its observance by regional or local governments or authorities within the territory of a Member.”¹⁵⁶ While the Understanding on Article XXIV:12 clarifies the responsibility of all GATT/WTO federal nation/states for the non-conforming behavior of their component units under the GATT/WTO, it leaves open the question of what constitutes “reasonable measures” to seek compliance. This is a particularly important question to consider in areas that fall within exclusive regional or local authority. Thus, despite the Uruguay Round Understanding on Article XXIV:12, the extent of federal nation/state obligations under Article XXIV:12 remains unclear and what constitutes “reasonable measures” to ensure local observance remains ambiguous.¹⁵⁷

B. GATT Panel Interpretations of Article XXIV:12

Article XXIV:12 was first applied and interpreted by a GATT dispute settlement panel in *Canada-Measures Affecting the Sale of Gold Coins*.¹⁵⁸ Although the Panel report has not been adopted, it provides an early, yet extensive, analysis of Article XXIV:12. South Africa claimed that a 1983 retail sales tax enacted by the Province of Ontario, Canada on gold coins violated Articles II and III of the GATT and that Canada failed to carry out its obligations under Article XXIV:12.¹⁵⁹ The provincial sales tax at issue exempted Canadian Maple Leaf gold coins from a 7% sales tax levied on all gold coins, whether produced in Canada or abroad.¹⁶⁰ Canada previously included gold coins in a duty-free tariff concession as part of the Tokyo Round agreements and South Africa claimed nullification and impairment of the benefits of the Tokyo Round concession.¹⁶¹ Taxation authority for revenue raising remained a provincial prerogative but responsibility for the regulation of trade and commerce in currency and coinage was within the exclusive authority of the Canadian Federal Parliament.¹⁶² Inferior Canadian courts were split on the issue of which level of government had coinage taxation authority, with cases holding both in favor of provincial authority and federal preemption.¹⁶³

The dispute settlement panel first determined that the Ontario sales tax measure violated GATT Article III:2 by subjecting the products of South

¹⁵⁶ *Id.* at ¶ 14.

¹⁵⁷ See Cooper, *supra* note 12, at 157.

¹⁵⁸ *Canada-Measures Affecting the Sale of Gold Coins*, Sept. 17, 1985, L/5863 .
[Hereinafter *Canada-Gold Coins*]

¹⁵⁹ *Id.* at ¶ 2.

¹⁶⁰ *Id.* at ¶ 5.

¹⁶¹ *Id.* at ¶ 6.

¹⁶² *Id.* at ¶ 8.

¹⁶³ *Id.*

Africa to an internal tax in excess of those applied to like domestic products.¹⁶⁴ The Panel then examined how Article XXIV:12 impacted Canada's obligations under Article III:2.¹⁶⁵ Noting the principle of State responsibility for the actions of its subsidiary organs embodied in Article 27 of the Vienna Convention on the Law of Treaties, the Panel found the basic purpose of Article XXIV:12 "was to qualify the basic obligation to ensure the observance of the General Agreement by regional and local government authorities in the case of contracting parties with a federal structure. . . ."¹⁶⁶ The basic question was "whether Article XXIV:12 applies (a) *all measures* taken at the regional or local level or (b) *only to those measures which the federal government cannot control* because they fall outside its jurisdiction under the constitutional distribution of competence."¹⁶⁷

After reviewing the legislative history of Article XXIV:12, the Panel concluded "that Article XXIV:12 applies only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence."¹⁶⁸ The Panel was unable to determine, based on the lack of Canadian jurisprudence, whether the measure at issue fell within the exclusive control of the federal government.¹⁶⁹ Accordingly, the Panel "concluded that Canada had to be given the benefit of the doubt" and applied Article XXIV:12 to the Ontario measure.¹⁷⁰

Two alternative interpretations of Article XXIV:12 were considered with respect to the subject measure.¹⁷¹ It could be interpreted either as (a) limiting the application of the other GATT provisions or (b) as limiting only the obligation of federal states to secure local implementation of the GATT.¹⁷² Article XXIV:12 is an exception to Vienna Convention Article 27 insofar as "it grants a special right to federal States without giving an offsetting privilege to unitary States" and therefore it could "lead to imbalances in rights and obligations between unitary and federal States" where the latter meets constitutional difficulties in carrying out its GATT obligations.¹⁷³ With this potential imbalance in mind,

the Panel considered that, as an exception to a general principle of law

¹⁶⁴ Canada-Gold Coins, *supra* note 158, at 14, ¶52.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (emphasis in original).

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.*

¹⁷⁰ Canada-Gold Coins, *supra* note 158, at 15-16.

¹⁷¹ *Id.* at 16.

¹⁷² *Id.*

¹⁷³ *Id.* at 17.

favouring certain contracting parties, Article XXIV:12 should be interpreted in a way that meets the constitutional difficulties which federal States may have in ensuring the observance of the provisions of the General Agreement by local governments, while minimizing the danger that such difficulties lead to imbalances in the rights and obligations of contracting parties. Only an interpretation according to which Article XXIV:12 does not limit the *applicability* of the provisions of the General Agreement but merely limits the obligations of federal States to secure their *implementation* would achieve this aim.¹⁷⁴

Finally, the Panel considered whether Canada fulfilled its obligation to take “such reasonable measures as may be available to it” to ensure Ontario’s observance of Article III:2.¹⁷⁵ With respect to what constitutes “reasonable measures” South Africa argued that Canada could have referred the matter to the Supreme Court and its failure to do so violated Article XXIV:12.¹⁷⁶ Canada asserted that Article XXIV:12 reserved to each contracting party the right to determine on its own whether a measure was reasonable.¹⁷⁷ The Panel rejected Canada’s position and ruled

that in determining which measures to secure the observance of the provisions of the General Agreement are ‘reasonable’ within the meaning of Article XXIV:12, the consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance.¹⁷⁸

The Panel weighed the negative trade implications of the Ontario measure against the domestic difficulty in securing observance of Article III:2 by Ontario and ruled that it could not determine whether referring the issue to the Canadian Supreme Court constitutes a reasonable measure.¹⁷⁹ In closing, the Panel recommended that Canada compensate South Africa for lost competitive opportunities and continue to take “such reasonable measures as are available” to secure observance by Ontario.¹⁸⁰

The second GATT panel to consider Article XXIV:12 involved a claim by the United States that certain practices of Canadian provincial liquor boards violated GATT Article III.¹⁸¹ In *Canada-Import, Distribution*

¹⁷⁴ *Id.* (emphasis in original).

¹⁷⁵ *Id.*

¹⁷⁶ *Canada-Gold Coins*, *supra* note 158, at 17.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 18.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Canada-Import, Distribution and Sale of Certain Alcoholic Drinks By Provincial Marketing Agencies*, DS17/R-39S/27 (October 16, 1991) [hereinafter *Canada-Import*],

and Sale of Certain Alcoholic Drinks By Provincial Marketing Agencies, the Panel considered practices of provincial liquor boards that enjoy monopoly power over the supply and distribution of alcoholic beverages within their provincial borders.¹⁸² The United States' complaint focused on the higher price mark-ups applied to imported beer compared with domestic beer and the allowance for private delivery and direct sales systems for domestic brewers, while imported brewers were forced to distribute through the provincial liquor boards.¹⁸³ The Panel concluded that these practices violated GATT Article III:4.¹⁸⁴

With respect to Article XXIV:12, the United States argued that Canada had not employed "reasonable measures" to induce observance of Article III:4 by provincial liquor boards because the Canadian Parliament had failed to utilize its power to impose discipline on the liquor boards.¹⁸⁵ Canada countered that the determination of what is "reasonable and available" under Article XXIV:12 must take into account the domestic legal and political situation and ultimately should be judged by the contracting party itself.¹⁸⁶ Similar to the earlier Panel in *Canada-Gold Coins*, the Panel concluded that GATT, and not the contracting parties, would be the ultimate judge of whether reasonable measures had been taken.¹⁸⁷ With respect to whether Canada had, in fact, employed reasonable measures, the Panel noted that "Canada would have to show that it had made a serious, persistent and convincing effort to secure compliance by the provincial liquor boards with the provisions of the General Agreement."¹⁸⁸ The Panel concluded that Canada failed to take reasonable measures to ensure compliance by the provincial liquor boards.¹⁸⁹

The last Panel to address Article XXIV:12 was formed several months after the United States filed its complaint against Canada in *Canada-Import*. In a reversal of roles, Canada requested a GATT panel to address excise taxes levied on imported beer and wine by United States federal and state

available at <http://www.worldtradelaw.net/reports/gattpanels/canadaalcdistributionII.pdf>. This complaint followed an earlier complaint brought by the European Community against Canada focusing on substantially similar measures. See *Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304-35S/37 (March 22, 1988), available at <http://www.worldtradelaw.net/reports/gattpanels/canadaalcdistribution.pdf>.

¹⁸² *Id.* at 1-2.

¹⁸³ *Id.* at 19-21, 25-28.

¹⁸⁴ *Id.* at 54-55.

¹⁸⁵ *Id.* at 38.

¹⁸⁶ *Canada-Import.*, *supra* note 181, at 52, ¶ 5.35.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 53.

officials.¹⁹⁰ The federal government and eighteen states maintained lower tax rates or tax credits for in-state and domestic brewers.¹⁹¹ The Panel found that the federal and state taxes violated the national treatment provisions of GATT Article III:2.¹⁹² In contrast to its position as complainant in the earlier GATT panel, the United States argued that GATT Article XXIV:12 could be invoked by countries with federal constitutional systems as a limitation on their duty to bring local laws into compliance with GATT.¹⁹³ Canada argued that the United States had an obligation to compel local observance of the GATT, relying in part on one scholar's view that the United States constitutional system allows the federal government to preempt state law and therefore compel state adherence to GATT.¹⁹⁴

The Panel first ruled that the United States failed to present any evidence that reasonable measures were unavailable to it in this case.¹⁹⁵ More importantly, the Panel concluded that there was no constitutional impediment to forcing state compliance.

The Panel noted in this respect that both parties agreed that under United States constitutional law GATT law is part of United States federal law and, being based on the Commerce Clause of the Constitution, overrides, as a general matter, inconsistent state law.¹⁹⁶

The Panel then considered whether United States federal law, including the GATT, overrides inconsistent state liquor laws in light of the Twenty-first Amendment to the United States Constitution which grants substantial regulatory authority over alcoholic beverages to the states.¹⁹⁷

Relying on several decisions of the United States Supreme Court, the Panel concluded that "the Twenty-first Amendment grants broad police powers to the states to regulate the distribution and sale of alcoholic beverages but does not grant the states powers to protect in-state producers of alcoholic beverages against imports of competing like products."¹⁹⁸

¹⁹⁰ *United States: Measures Affecting Alcoholic and Malt Beverages*, DS23/R-39S/206 (March 16, 1992), [hereinafter *Alcoholic and Malt Beverages*] available at <http://www.worldtradelaw.net/reports/gattpanels/usmaltbeverages.pdf> (last visited Sept. 23, 2004).

¹⁹¹ *Id.* at 2-3.

¹⁹² *Id.* at 80-81.

¹⁹³ *Id.* at 54.

¹⁹⁴ *Id.* at 54, citing Hudec, *supra* note 12.

¹⁹⁵ *Alcoholic and Malt Beverages*, *supra* note 90, at 79.

¹⁹⁶ *Id.* at 70.

¹⁹⁷ *Id.* at 71.

¹⁹⁸ *Id.*

Accordingly, the Panel concluded that the United States has not demonstrated to the Panel that the general obligation of contracting parties to withdraw measures inconsistent with the General Agreement cannot be observed in this case by the United States as a result of its federal constitutional structure and that the conditions for the application of Article XXIV:12 are met.¹⁹⁹

Other than the reference in *Canada-Import* to “serious, persistent, and convincing effort,”²⁰⁰ no GATT panel has discussed what constitutes a “reasonable measure” under Article XXIV:12. On the other hand, the Panel decision in *United States: Measures Affecting Alcoholic and Malt Beverages* makes it clear that with respect to measures “available to” Members, where the federal government has legal authority it has an obligation to take some “reasonable measures” to force changes to GATT-inconsistent measures. No Panel has squarely and definitively addressed the situation where the federal government does not have legal authority over an area in which a regional or local government has enacted a non-conforming measure. The position adopted by the United States in *United States: Measures Affecting Alcoholic and Malt Beverages* highlights the inconsistency with respect to how U.S. officials view the interaction of GATT/WTO and state constitutional powers. During consideration of the Panel report for adoption at the June 1992 Council meeting, the United States representative stated with respect to the Panel’s conclusion that the U.S. federal structure allows GATT obligations to preempt GATT-inconsistent state law, that “[w]hile the United States would not oppose adoption of the Panel report, it would enter for the record a formal reservation” regarding paragraph 5.80.²⁰¹ That statement parallels the United States’ position since 1949 which is now codified in the Uruguay Round agreements implementing legislation and accompanying SAA.²⁰²

VI. ALTERNATIVE APPROACHES

As the world trading system opens up to more disciplines and nations, subnational non-tariff barriers pose an ever increasing challenge to trade liberalization. Regional and local governments are increasingly engaging the international system.²⁰³ Traditional notions of nation/state sovereignty are evolving towards greater direct and indirect participation by subnational governmental units in economic and political matters impacting foreign

¹⁹⁹ *Id.* at 80.

²⁰⁰ *Canada-Import*, *supra* note 181, at 52 and accompanying text.

²⁰¹ GATT, ANALYTICAL INDEX, *supra* note 140, at 836.

²⁰² SAA, *supra* note 117 and accompanying text.

²⁰³ See Spiro, *Globalization supra* note 41, at 669.

affairs.²⁰⁴ This is even true in the United States, where the traditional exclusive role of the federal government in foreign affairs is being debated by what many view as a pro-states' rights Supreme Court²⁰⁵ and where record trade deficits and job losses are re-engaging states in the international trade debate.²⁰⁶ As an economic matter, there is no question that non-conforming regional and local measures can significantly diminish the welfare gains sought through greater integration and liberalization of the world trade system.²⁰⁷

While admittedly the GATT/WTO system is not under seige from non-conforming subnational measures, the ambiguities in the current structure could lead to significant future problems as regional and local governments increasingly participate in world trade. Despite the enactment of the Understanding on the Interpretation of Article XXIV in the Uruguay Round, the issue of subnational compliance with GATT/WTO obligations remains unclear.²⁰⁸ The unresolved ambiguities in Article XXIV:12 are heightened by the United States' position that its GATT/WTO obligations do not automatically preempt state law.²⁰⁹ There are primarily two ways to address and reform the current GATT/WTO regulatory framework.

The first, and more invasive, approach focuses on the WTO and its mechanism for regulating regional and local governments. This "outside-in" approach calls for an amendment to Article XXIV:12 in order to strengthen its compliance obligations, and requires broad support because it is subject to the WTO amendment procedures.²¹⁰ The primary model for the amendment is the federal clause contained in NAFTA Article 105, which provides that "[t]he Parties shall ensure that *all necessary measures* are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments."²¹¹ Article 105 derives from Article 103 of the United States-Canada Free Trade Agreement ("CFTA").²¹² Unlike the Uruguay Round and NAFTA implementing legislation and SAA, the CFTA implementing legislation explicitly states that the CFTA

²⁰⁴ *Id.* at 668-669.

²⁰⁵ See *supra* note 71 and accompanying text.

²⁰⁶ See *supra* note 9.

²⁰⁷ See Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 CAN-U.S. L.J. 441, 448-49 (1997).

²⁰⁸ See *supra* note 157 and accompanying text.

²⁰⁹ See *supra* note 117 and accompanying text.

²¹⁰ WTO, *supra* note 20, art. X.

²¹¹ North American Free Trade Agreement, Dec. 17, 1992, Art. 105, 32 I.L.M. 289 [hereinafter NAFTA] (entered into force Jan. 1, 1994) (emphasis added).

²¹² United States-Canada Free Trade Agreement, Dec. 22, 1987 and Jan. 2, 1988, U.S.-Can., art. 103, 27 I.L.M. 281 [hereinafter CFTA].

prevails over any conflicting state or local law, including laws in the area of insurance.²¹³ The text of the CFTA itself specifically outlines the areas where the CFTA does not prevail over state and provincial measures, including certain alcohol distribution practices.²¹⁴

The “all necessary measures” language in NAFTA Article 105 arguably eliminates the ambiguities of the “reasonable measures” language in GATT Article XXIV:12.²¹⁵ While no dispute resolution panel has reviewed the CFTA or NAFTA federal clauses, the “all necessary measures” language can reasonably be interpreted to impose a requirement on federal states to do whatever it takes within its constitutional authority to ensure state compliance.²¹⁶ Indeed, during the NAFTA debate, concern was voiced by “labor, environmental, and constitutional conservatives” that the “all necessary measures” language of NAFTA Article 105 created a greater preemptive effect on state laws than the “reasonable measures” language of GATT Article XXIV:12.²¹⁷ In response to these concerns, the NAFTA implementing legislation and accompanying SAA characterize the language of NAFTA as an international obligation which does not automatically preempt state law.²¹⁸ Similar language was included in the Uruguay Round implementing legislation and SAA.²¹⁹

Despite the various assurances by the United States federal government of their non-preemptive effect on state laws, NAFTA and GATT/WTO are international agreements forming part of federal law in the United States, and as such create binding obligations on behalf of the federal government. While some WTO Members (particularly non-federal Members) would likely support an amendment to strengthen GATT Article XXIV:12 in order to further clarify the obligation of federal states, any amendment would likely face an uphill battle in the United States. Notwithstanding the resurgence in debate over state participation in foreign affairs, the current political climate is quite simply too volatile to win support for any amendment requiring the federal government to take more

²¹³ See JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE U.S.-CANADA FREE-TRADE AGREEMENT 354-55 (1990).

²¹⁴ *Id.* at 355.

²¹⁵ See Sarah M. Vogel, *The Effects of NAFTA Upon North Dakota State Law*, 70 N.D. L. REV. 485, 489 (1994).

²¹⁶ See Cooper, *supra* note 12, at 157-58; Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L. J. 216, 250 (1995).

²¹⁷ Vogel, *supra* note 215, at 489. The debate was focused primarily on the GATT Panel’s conclusion in *United States: Measures Affecting Alcoholic and Malt Beverages*, *supra* note 190 and accompanying text.

²¹⁸ NAFTA, Statement of Administrative Action, H.R. Doc. No. 159, 103d Cong., 1st Sess. 50, 154 (1993).

²¹⁹ See *supra* note 117.

drastic measures to ensure state observance.

More importantly, even if the “all necessary measures” language of NAFTA Article 105 was adopted, at the end of the day, federal states may simply be unwilling or unable to press regional and local territories into compliance. For example, what if the subject matter of the measure falls within the exclusive constitutional authority of the regional or local government? Is the central government required to alter its constitutional structure to ensure observance? One can certainly argue that such a drastic measure could be considered a “necessary measure” under the language of NAFTA Article 105. It is practically unimaginable that a sovereign nation would alter its constitution to conform to obligations contained in an international treaty. If that were a realistic interpretation of the obligation under any federal clause, it is very likely that no sovereign nations would choose to participate in the international agreement.

This gap in the federal clauses of both GATT/WTO and NAFTA essentially leads to an “efficient breach” situation where the federal state is forced to accept the penalties associated with violation of its international agreement because it has no legitimate reasonable or necessary measures available to ensure observance of the agreement at the local level. While the “efficient breach” option may make sense politically for federal states, it does not serve the greater purpose of trade liberalization. Negatively affected Members are forced to devote resources to address non-conforming measures in the WTO dispute settlement process. The non-conforming measures are more appropriately addressed domestically by the offending Member as opposed to the supranational organization in Geneva.

The second, and less invasive, approach is the “inside-out” approach which maintains the current language of Article XXIV:12 while re-engaging and re-energizing regional and local governments in the trade process at the domestic level. The main goal of this approach is to decrease the potential for regional and local non-conforming measures through greater domestic education, participation and administration in the international trade system. Areas of direct and indirect involvement include: (1) increased input into trade negotiations; (2) increased involvement in the development of implementing legislation; and (3) a larger role in the administration of the trade disciplines implicating regional and local measures.²²⁰

The United States adopted a formal domestic regulatory framework for state education and participation in international trade. The regulatory mechanism is the Intergovernmental Policy Advisory Committee (“IGPAC”), which consists of approximately thirty-five members

²²⁰ See Schaefer, *supra* note 7, at 137.

representing the states and various other non-federal entities.²²¹ The IGPAC was initially created in the 1974 Trade Act and is charged to work directly with the Office of the United States Trade Representative “to provide overall policy advice on trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.”²²² In addition to IGPAC, and because of the large number of subfederal units in the United States, many national associations representing the collective interests of all fifty states submit policy statements and proposals directly to the federal government.²²³ For example, the National Governors Association adopted the Governors’ Principles on International Trade Policy which broadly sets forth the views of the National Governors Association on the current trade agenda.²²⁴

While there has been no comprehensive analysis of the efficacy of this or similar domestic frameworks for regional and local participation, it has worked well in the United States with respect to areas such as the Sanitary and Phytosanitary, Technical Barriers to Trade and Government Procurement disciplines, each of which implicates state governments. For example, with respect to the side agreement on Government Procurement, the United States was able to secure voluntary commitments from 37 state governments through the consent of their governors.²²⁵ However, this approach has not operated without complaint. On March 12, 2004 the IGPAC submitted its report on the proposed United States-Australia Free Trade Agreement. In addition to expressing its general support for the proposed FTA, the IGPAC seized the opportunity to express its

²²¹ See Office of the United States Trade Representative, *Charter of the Intergovernmental Policy Advisory Committee on Trade*, enacted pursuant to 19 U.S.C. 2155(c)(2), as amended, available at <http://www.ustr.gov/outreach/igpacharter.pdf> (last visited on March 15, 2004). As of March, 2004 the IGPAC roster consisted of 41 members representing a broad spectrum of state interests.

A similar advisory committee worked extremely well during the negotiations on the North American Free Trade Agreement where the Office of the United States Trade Representative appointed a “NAFTA coordinator for state matters.” See Schaefer, *supra* note 7. The NAFTA implementing legislation and SAA grants the states, for the first time, a guaranteed right to be informed and to participate in trade matters affecting the states. *Id.* The Uruguay Round implementing legislation and SAA follows suit and names a “WTO Coordinator for state matters.”

²²² *Id.*

²²³ See Schaefer, *supra* note 7.

²²⁴ National Governors Association, *Governors’ Principles on International Trade Policy*, §11, available at http://www.nga.org/nga/legislativeUpdate/1,1169,C_POLICY_POSITION^D_506,00.html (last visited on February 5, 2004).

²²⁵ See Schaefer, *supra* note 207, at 471. The federal government used a voluntary approach whereby states did not have to decide under an “all or nothing” commitment, but rather could choose the state entities that would be bound. *Id.* The bound entities are listed in a commitment schedule in Annex 2 to the Government Procurement Code.

dissatisfaction with the current method of obtaining state support in areas within their constitutional authority.

Statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements. These concerns were reflected by Congress' inclusion of the "no greater rights" language in Trade Promotion Authority legislation. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority should be maintained. Full and effective coordination and consultation should include requesting authority from the appropriate state or local authority before a state or local rule, regulation, or statute is listed in a trade agreement, offer or other binding commitment. IGPAC would prefer a process that relies upon affirmative, informed consent from affected state and local entities, rather than negative opt-out.²²⁶

As noted by the IGPAC report, the "inside-out" informal approach limits local input to non-binding advice and a single "opt-out" choice. An additional problem is that this approach leads to an inefficient, piecemeal commitment in schedules that are difficult even for practitioners to digest. To the extent that this framework could be strengthened to allow subfederal units to offer informed consent or binding advice with respect to commitments in areas constitutionally allocated to them, it could serve as a model approach not only for the United States but also for other federal states. This approach will be particularly useful if the WTO seriously intends to reach a single commitment or undertaking in areas such as services that are highly regulated at the local level. Finally, many have criticized the United States' framework for federal-state consultation as really nothing more than window dressing, with serious consultations rarely occurring. The IGPAC has called for a fully funded, "regularly scheduled mechanism for US federal-state trade policy consultations in light of the increasing state role in trade policy formulation, negotiation and dispute resolution."²²⁷ While most Americans dare not support the creation of additional bureaucratic infrastructure, this is one area where a firm structure could reap dividends both politically and economically.

²²⁶ *Report of the Intergovernmental Policy Advisory Committee on the US-Australia Free Trade Agreement (FTA)* 2 (Mar. 12, 2004), available at <http://www.ustr.gov/new/fta/Australia/advisor/igpac.pdf>.

²²⁷ *Id.* at 7.

VII. CONCLUSION

To the extent international trade debate continues to focus primarily on trade issues at the international and national levels, subnational barriers to trade may remain more of an academic exercise to ponder for later days. However, if the multilateral trade process gets back on track with increasing trade liberalization and commitment of more disciplines to the world trading system, subnational barriers to trade will increase and may be the last bastion of protectionism in a world where virtually all goods and services are committed to tariff bindings and international regulations. At that time, the WTO system will require a formal, efficient and effective process for ensuring regional and local compliance with GATT/WTO obligations. Whether that process assumes the form of national regulatory institutions allowing for internal regional and local participation, or an international regulatory framework imposing stricter requirements on federal states to force subnational compliance, remains to be seen.